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IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1976

NO. **76-1845**

EX PARTE: SHEARN MOODY, JR.,  
*Petitioner,*

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**PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE STATE OF  
ALABAMA**

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Petitioner Shearn Moody, Jr. respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Alabama entered on January 25, 1977, refusing to set aside an adjudication that the Petitioner had failed to purge himself of contempt. This case involves important questions as to the denial of the Petitioner's right to due process of law under the Fourteenth Amendment as well as the denial of the Petitioner's rights under the First Amendment to the United States Constitution.

**OPINIONS BELOW**

The Opinion of the Alabama Supreme Court denying the Petitioner's Petition for Writ of Certiorari in the Alabama Supreme Court appears in Appendix A following this Motion. The Opinion of the Alabama Supreme Court refusing to consider the Petitioner's Application for Rehearing appears in Appendix B.



### JURISDICTION

The Judgment of the Alabama Supreme Court was entered January 25, 1977. A timely Application for Rehearing was rejected on February 22, 1977. A timely Motion for Extension of Time to File Petition for Writ of Certiorari was filed by Petitioner and granted by Order of The Honorable Lewis F. Powell dated April 17, 1977, which Order extended the Petitioner's time for filing this Petition to and including June 24, 1977. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3) (1970).

### QUESTIONS PRESENTED

1. Whether under the Fourteenth Amendment to the United States Constitution, Petitioner Shearn Moody, Jr. was denied due process of law when the Alabama trial court conducted a hearing and entered a money judgment against him for failure to purge himself of civil contempt in the absence of:

(a) a Complaint, Petition or Prayer notifying the Petitioner of the claim to be litigated, including information about the claim;

(b) a hearing based upon proper notice and conducted at a time which afforded the Petitioner an opportunity to present evidence and argument;

(c) a judgment entered in accordance with proper notice and hearing.

2. Whether the Petitioner was denied due process of law under the Fourteenth Amendment to the United States Constitution by the Alabama Trial Court's rendition of the judgment dated November 1, 1976 finding that the Petitioner had failed to purge himself of civil contempt by failing to comply with,

*inter alia*, conditions (e) and (h) set forth in its April 30, 1975 decree, which conditions the Petitioner was unable to comply with.

3. Whether Petitioner Moody's First Amendment right of freedom of association and his Fourteenth Amendment right to due process of law were violated by Paragraph (g) of the trial court's order of April 30, 1975, requiring Moody to purge himself of civil contempt by terminating completely the employment of certain attorneys named in the order, which attorneys were employed on Moody's behalf in cases *other than* the case which was the subject matter of the contempt order, and by the trial court's judgment of November 1, 1976, assessing damages against Moody for allegedly failing to comply with Paragraph (g) of said order.

### CONSTITUTIONAL PROVISIONS INVOLVED

#### First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

#### Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

\* \* \*

### **Alabama Constitution of 1901.**

Art. I §10: That no person shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel, any civil cause to which he is a party.

### **STATEMENT OF THE CASE**

The parties to the State Court proceeding were Shearn Moody, Jr., ("Moody") the Petitioner herein; Protective Life Insurance Company, ("Protective") an Intervenor below; and Charles H. Payne, Commissioner of Insurance of the State of Alabama, as Receiver for Empire Life Insurance Company of America, domiciled in Alabama.

In 1972, the then Honorable John G. Bookout, Commissioner of Insurance of the State of Alabama, ("Receiver") filed a Complaint against Empire Life Insurance Company of America ("Empire") to have it placed in receivership by the Alabama Circuit Court of Jefferson County, Equity Division. The Receiver's action was instituted under the Uniform Insuror's Liquidation Act, Title 28A, Chapter 28, Code of Alabama 1940 (1958 Recompile Supplement). Protective and Moody were allowed to intervene in that receivership and liquidation proceeding, the case being designated as Case No. 171-687 by the Trial Court. A Decree was rendered in that proceeding on June 14, 1974, finding that Empire could not be rehabilitated

and ordering its liquidation.<sup>1</sup> A part of the June 14, 1974 Order provided that the Receiver accept and execute a proposal by Protective for the reinsurance of Empire's policies. The Protective proposal for reinsurance, as amended, was, pursuant to the June 14, 1974 Order, ordered accepted and executed by the Receiver.

On January 6, 1975, the trial court entered a permanent injunction enjoining Moody from filing or aiding in the filing of any lawsuit, complaint, or legal claim, or any amendment to any complaint or legal claim, which related to the Empire receivership or the implementation of any order or decree of the receivership court, without the prior approval of the receivership court. On March 10, 1975, the trial court entered an order finding Moody to be in civil contempt of the January 6, 1975, decree for allegedly participating in the prosecution of *Allmon v. John G. Bookout, et al.*, Cause No. CA 74-377-N filed by Willie Allmon on November 22, 1974 in the Middle District of Alabama [hereinafter "*Allmon*"]. Petitioner Moody subsequently filed a Petition for Writ of Mandamus and other relief in the Alabama Supreme Court complaining of the March 10, 1975 order. In response thereto, on April 23, 1975, the Alabama Supreme Court issued a show cause order to the trial court requiring it to set forth the conditions by which Moody could purge himself of civil contempt.

By order entered by the trial court on April 30, 1975, the court vacated its March 12, 1975 order, adjudicated Moody to

<sup>1</sup>Moody appealed the Order of June 14, 1974, and the Alabama Supreme Court affirmed the Decree on February 11, 1977. Moody timely filed an Application for Rehearing on February 25, 1977, which Application was denied by the Alabama Supreme Court on April 22, 1977.



be in civil contempt of the receivership court for having failed to obey the January 6, 1975 injunction, and set forth numerous conditions by which Moody could purge himself of civil contempt. See Exhibit 3 to Appendix D.

The conditions set forth in the Order required Moody, in part, to do the following: Paragraph (e) required Moody to require certain named persons to file sworn statements with the court providing information as to their participation in the *Allmon* case. Paragraph (g) required Moody to discharge any attorney who had anything to do with the *Allmon* case, and Paragraph (h) required Moody to appear before the trial court on May 12, 1975, which he did in fact do, and at such other times as the court may direct.

On June 16, 1976, the trial court *ex mero motu* ordered Moody to appear before it on July 19, 1976, to demonstrate that he had purged himself of civil contempt and had fully complied with the April 30 order. See Exhibit 2 to Appendix D. No pleadings were filed by the parties framing issues for the July 19th hearing, the Trial Court stating that it wanted no pleadings filed:

After a hearing, consideration, and ruling by this Court, I do not want any further pleadings filed by anybody in this case relative to this contempt hearing. I will accord anybody that wants to furnish this court with briefs and memoranda based upon what has happened, and will happen up to the termination of his hearing today, that's all that I will receive.

[Record 978-979]

At the commencement of the July 19th hearing, Mr. Roy Cohn of the New York Bar was introduced to the Trial Court by

Drayton N. James, local counsel for the Petitioner. The trial court permitted Mr. Cohn to appear on Moody's behalf and Mr. Cohn presented an affidavit from E. B. Vogelpohl, Jr., M.D. of Galveston, Texas, which certified that the Petitioner was ill and unable to appear before the trial court on the date of the hearing. Mr. Cohn respectfully moved orally for a continuance of the hearing to a date at which the Petitioner would be physically able to appear and testify on his own behalf. The trial court denied the Motion and ordered that the hearing proceed. The trial court indicated at the outset that the burden of proof was on Moody to purge himself of contempt. Moody offered into evidence five Exhibits consisting of certain correspondence to show compliance with the conditions set forth in the April 30, 1975 Order of the trial court. The trial court however sustained the objections of Protective and excluded these exhibits.

Following the conclusion of the hearing on July 19, 1976, the trial court permitted the parties one week to file briefs. Petitioner Moody filed a Memorandum Brief in which he asserted that he had not been given sufficient time to prepare his case and to engage in discovery to the extent necessary to enable him to examine and prepare a response to the documents offered into evidence by Protective. See Appendix C. Further, Petitioner Moody attacked the trial court's denial of his attorneys' request for a continuance because of the illness of Moody and his inability to attend and to respond personally to the charges made by Protective. Petitioner Moody also attacked condition (g) of the April 30, 1975, Order requiring him to terminate the employment of certain attorneys named therein in cases other than *Allmon v. Bookout* which was the subject matter of the contempt decree. Moody asserted that the order

was overbroad and violated his First Amendment right of freedom of association and his Fourteenth Amendment right to due process of law.

The matter was taken under advisement and thereafter the Judgment appealed from was entered on November 1, 1976. See Exhibit 1 to Appendix D. The Judgment appealed from makes numerous findings of fact and concludes with the following adjudications:

1. That Moody has failed to purge himself of civil contempt with the trial court;
2. That Moody has failed to comply with paragraphs (c), (e), (g), (h) and (j) of the Order of the trial court entered on April 30, 1975;
3. That Moody is ordered to pay Protective and the Receiver all costs, damages and expenses incurred by them as a result of the Defendant's failure to purge himself of civil contempt.
4. That Moody is ordered to pay all costs and expenses incurred by Protective in the investigation, preparation for, and conduct of civil contempt proceedings, including the July 19, 1976, proceeding.

Moody gave Notice of Appeal from the November 1, 1976, Judgment on November 23, 1976, and said Appeal is pending before the Alabama Supreme Court. As an alternative method of reviewing the Judgment, Petitioner also filed a Petition for Writ of Certiorari in the Alabama Supreme Court on November 23, 1976, which Petition for Certiorari was denied on January 25, 1977, and constitutes the basis for the Petitioner's writ filed with this Court. In the Petitioner's writ of certiorari below the Petitioner attacked the trial court's finding that the Petitioner had failed to purge himself of civil contempt by fail-

ing to comply with the conditions set forth in the April 30, 1975 decree, and questioned the validity of the trial court's assessment of monetary damages, costs, expenses and attorneys fees against the Petitioner in the civil contempt proceeding conducted on July 19, 1976. See Appendix D.

## REASONS FOR GRANTING THE WRIT

### I.

PETITIONER SHEARN MOODY, JR. WAS DENIED DUE PROCESS OF LAW WHEN THE ALABAMA TRIAL COURT CONDUCTED A HEARING TO DETERMINE WHETHER HE HAD PURGED HIMSELF OF CIVIL CONTEMPT WITHOUT PROVIDING HIM WITH

A. NOTICE AND INFORMATION AS TO THE CLAIMS TO BE LITIGATED, AND

B. A HEARING CONDUCTED AT A TIME WHICH AFFORDED THE PETITIONER AN OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT.

The July 19, 1976, hearing at which the Petitioner was ordered to appear and establish that he had complied with the conditions set forth in the trial court's order of April 30, 1975 [Exhibit 3 to Appendix D], and had thereby purged himself of contempt, was obviously not a traditional judicial proceeding. It was based on no pleadings filed by the parties asserting claims and defenses or demanding any relief. On June 16, 1976, the trial court simply entered an order *ex mero motu* [See, Exhibit 2 to Appendix D] directing Moody to appear on July 19, 1976, and "demonstrate to the court" that he had purged himself of civil contempt and that he had "fully complied with"



the trial court's order of April 30, 1975.

The only pleading or citation filed or issued in connection with the July 19, 1976 hearing was the June 16 order. This order obviously did not sufficiently notify the Petitioner of any charges that he had made no attempt to comply, or that he had totally failed to comply with the April 30, 1975 order, nor did the order notify the Petitioner that damages would be assessed against him if the Court found that he had made no effort to comply or had totally failed to comply with the order.

In *Cooke v. The United States*, 45 S.Ct. 390, 267 U.S. 517 (1925), this Court held that when ever an individual is charged with indirect contempt, that is contempt not in open court, there is no right or reason in dispensing with the necessity of charges and the opportunity of the accused to present his defense by witnesses and argument. Indeed this Court held that: "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation." *Cook* at 45 S.Ct. 395; 267 U.S. 537.

In *In Re Oliver*, 68 S.Ct. 499, 333 U.S. 257 (1948), a witness was summarily convicted of contempt of court for refusing to answer questions and was ordered confined in jail for a period of not less than 60 days or until he agreed to appear and answer certain questions. In reversing the judgment of contempt, this Court held that:

. . . failure to afford the Petitioner a reasonable opportunity to defend himself against the charges of false and evasive swearing was a denial of due process of law. A person's right to reasonable notice of a

charge against him, and an opportunity to be heard in his defense — a right to his day in court — are basic in our system of jurisprudence, and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel. [*In Re Oliver*, 68 S.Ct. 507-8; 333 U.S. 273]

Similarly, in the present action, the Petitioner, as a matter of due process of law, was entitled to notice as to whether he was being charged with making no effort to comply with the April 30, 1975 decree, or that he had totally failed to comply therewith. At a minimum, the Petitioner was entitled to notice of the specific portions of the April 30, 1975, decree with which he had allegedly failed to comply, as well as a reasonable opportunity to appear and establish that he had in fact complied with the court's decree.

At the hearing conducted on July 19, 1976, Petitioner's counsel, Mr. Roy Cohn, appeared and orally moved for a continuance on the ground that the Petitioner was too ill to appear before the court and testify in his own behalf. Petitioner's counsel presented the affidavit of the Petitioner's personal physician in support of the motion for continuance. The trial court nonetheless denied the motion and ordered that the hearing proceed. The Petitioner Moody submits that the trial court's denial of his motion for a continuance denied him due process of law since he was unable to appear and provide testimonial contradiction to the evidence produced by Protective and Receiver at the hearing.

The order of November 1, 1976, [See Exhibit 1 to Appendix D] entered as a result of the July 19, 1976 hearing and

finding that the Petitioner had failed to purge himself of civil contempt appears to be more than a contempt decree since it also awards damages. It appears, in effect, to be a final money judgment leaving open only the determination of the amount of damages to be awarded. The November 1, 1976, decree therefor is in the anomalous posture of being a money judgment based upon no complaint, petition or prayer of any claimant. The judgment in itself seems to violate a fundamental concept of due process — that a party is entitled to notice and a reasonable opportunity to be heard before he can be deprived of life, liberty or property.

The Fourteenth Amendment of the United States Constitution guarantees due process of law to parties in state court proceedings. A money judgment may not be rendered against a party unless he has been afforded due process of law. Due process of law, in the setting of a civil case, requires the following:

1. Notice of the claim asserted, including information about the claim.
2. A hearing based upon the notice given with an opportunity to present evidence and argument.
3. A judgment entered in accordance with that notice and hearing.

*Goss v. Lopez*, 419 U.S. 565 (1975); *Schroeder v. New York*, 371 U.S. 208 (1972); *Mulhane v. Central Hanover Bank and Trust Company*, 339 U.S. 306 (1950); *Simon v. Craft*, 182 U.S. 427 (1900); *Vernon v. State*, 245 Ala. 633, 18 So. 2d 388 (1944); *Garrett v. Reid*, 244 Ala. 754, 13 So. 2d 97 (1943).

The portion of the November 1, 1976, judgment assessing liability for monetary damages against the Petitioner obviously fails to comply with the requirements of due process. No plead-

ings were filed by the parties who had judgments rendered in their behalf. The only notice provided to the Petitioner was the June 16, 1976 order which failed to even hint that liability for monetary damages would be assessed against the Petitioner if he failed to establish that he had complied with the conditions set forth in the April 30, 1975 decree. Notice of one claim and the rendition of a judgment upon another violates all principles of sense and justice. *Kirkland v. Pilcher*, 174 Ala. 170, 57 So. 46 (1911). Notice and justice are the essence of due process. The rendition of the November 1, 1976 judgment assessing monetary damages against the Petitioner clearly involved a taking of his property without due process of law.

Finally, Paragraph (e) of the order of April 30, 1975, required the Petitioner to "require" several persons to immediately furnish to him sworn statements setting forth in detail the amount of all fees received by them from the Petitioner since November 1, 1974, the amount of all funds expended which relate to the *Allmon* action, and the purpose for which such expenditures were made. The Petitioner's counsel attempted to offer into evidence at the July 19 hearing, copies of correspondence from Petitioner to some of these parties inquiring about the matter set out in this portion of the April 30, 1975 order. The trial court however sustained the Receiver and Protective's objections to this offer of evidence.

By refusing to allow this correspondence into evidence, the trial court clearly denied the Petitioner the right to show that he had attempted to comply with the court's decree. Every party has the right to be heard, to present evidence and to rebut charges made against him in legal proceedings. ALABAMA CONSTITUTION of 1901, Art. I, §10; *McCollum v. Birmingham Post*



*Company*, 259 Ala. 88, 65 So.2d 689 (1953). Petitioner was clearly denied due process of law by being denied the right to establish that he had in fact made an effort to comply with the conditions set forth in the April 30, 1975 decree. The refusal of the offered evidence amounts to a denial of the Petitioner's right to show mitigating or extenuating circumstances.

## II.

AS A MATTER OF DUE PROCESS OF LAW WHEN AN INDIVIDUAL IS UNABLE TO COMPLY WITH A COURT DECREE, HE CANNOT BE ADJUDGED TO BE IN CONTEMPT OF COURT IN CONNECTION THEREWITH.

Paragraph (e) of the April 30, 1975 decree required the Petitioner as a condition for purging himself of contempt to require certain named persons to file sworn statements pertaining to their participation in the *Allmon* case. This condition calls upon the Petitioner to perform what may be an impossibility. The Petitioner had, and indeed has, no power to compel the persons named to do what the trial court ordered. Petitioner did obtain such affidavits from some of the persons but was unsuccessful in attempting to secure statements from all of such persons. Indeed, when the Petitioner attempted to introduce exhibits as to his attempt to comply with paragraph (e) the offered exhibits were denied admission by the trial court into evidence. As a matter of due process of law, a contempt judgment cannot be rendered against a party for failure to perform an act which the party cannot perform. As this Court indicated in *McNeil v. Director, Patuxent Institution*, 407 U.S. 243, 351 (1971): "Civil contempt is coercive in nature, and consequently there is no justification for confining on a civil contempt hearing

a person who lacks the present ability to comply." Where a court is not satisfied of the factual ability of the accused to make compliance, no contempt order should issue. *Maggio v. Zeitz*, 333 U.S. 56 (1948); See also, *Oriel v. Russell*, 278 U.S. 358, 366, 49 S. Ct. 173 (1929); *Sheehan v. Hunter*, 133 F.2d 303 (8th Cir. 1943); *Toplitz v. Walser*, 27 F.2d 196 (3rd Cir. 1928); *Re Rosser*, 101 F. 562, 566 (8th Cir. 1900).

Paragraph (h) of the April 30, 1975 decree required the Petitioner to appear before the trial court on May 12, 1975, and at such other times as the court may direct. The Petitioner did in fact appear before the court on May 12, 1975 and his deposition was taken on that date. The only other date upon which the Petitioner failed to appear was at the hearing on July 19, 1976, which failure to appear was clearly excusable by virtue of the Petitioner's ill health. Accordingly, the Petitioner submits that the November 1, 1976 decree finding the Petitioner to be in civil contempt of court for failing to comply with the foregoing conditions is contrary to due process of law because of the Petitioner's inability to comply with said conditions.

## III.

REQUIRING THE PETITIONER TO PURGE HIMSELF OF CIVIL CONTEMPT BY TERMINATING COMPLETELY THE EMPLOYMENT OF CERTAIN ATTORNEYS, WHICH ATTORNEYS WERE EMPLOYED ON THE PETITIONER'S BEHALF IN CASES OTHER THAN THE CASE WHICH WAS THE SUBJECT MATTER OF THE CONTEMPT ORDER, VIOLATED THE PETITIONER'S FIRST AMENDMENT RIGHT OF FREEDOM OF ASSOCIATION AND HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

Paragraph (g) of the April 30, 1975 decree [See Exhibit 3 to Appendix D] requires the Petitioner to purge himself of contempt by terminating immediately all employment of certain attorneys designated in the order. The Petitioner submits that the order is overbroad in that it requires as a condition to the Petitioner's purging himself of contempt that he terminate all further representation by the designated attorneys in cases other than *Allmon v. Bookout, supra*, the subject matter of the contempt order. Petitioner submits that under the constitution of the United States as well as under the laws of the state of Alabama, that he has the right to be represented in cases other than the *Allmon* case by attorneys of his own choice. The Petitioner further submits that he cannot be subjected to a contempt sanction for failing or refusing to comply with a court order which the court had no authority to render. *Musgrove v. U.S. Pipe and Foundry Co.*, 290 Ala. 156, 274 So. 2d 640 (1972); *Board of Revenue of Covington County v. Merrill*, 193, Ala. 521 68 So. 971 (1915).

Every person has an absolute right to be represented by attorneys of his own choosing. ALABAMA CONSTITUTION OF 1901, Art. I § 10; *See, Powell v. Alabama*, 287 U.S. 45 (1932); *State Realty Company v. Ligon*, 218 Ala. 541, 119 So. 672 (1921); *McKinley v. Campbell*, 217 Ala. 139, 115 So. 98 (1927); *Withers v. State*, 36 Ala. 256 (1860). Paragraph (g) of the April 30, 1975 decree violates this constitutional right and accordingly is void.

The right to be represented by counsel of one's own choice flows not only from the common laws of the various states but also from the due process clause of the United States constitution. In addition, the First Amendment to the United States

constitution guaranteeing freedom of speech, assembly and petition also guarantees any person the right to association with attorneys of his own choice. For this reason, in *United Mine Workers of America, District 12 v. The Illinois State Bar Association*, 389 U.S. 217, 88 S. Ct. 353 (1967), this Court held that the Illinois State Bar Association was precluded under the First Amendment to prohibit a union from hiring attorneys of its choice on a salary basis to assist the members in prosecuting workman's compensation claims. Any court order which prohibits a person from obtaining counsel of his choice is beyond that court's authority and is void. *Selvy v. Jacobucci*, 142 Colo. 53, 349, P.2d 567 (1960).

In the *Selvy* case, an attorney was employed by a juvenile to represent the juvenile in a delinquency proceeding. The parents of the juvenile filed a petition to prohibit the representation and the court entered an order precluding the attorney from representing the juvenile. The Colorado Supreme Court held that the juvenile had selected counsel of her own choosing, that the juvenile had an absolute right to a counsel of her own choosing, and that thus the court's order prohibiting the attorney from appearing and representing the client was beyond the court's jurisdiction and void.

Similarly, the Petitioner submits that the trial court exceeded its jurisdiction and authority by ordering the Petitioner to terminate for any purpose in any actions the enumerated attorneys. Such an order effectively denied the Petitioner the right to representation by attorneys of his own choice in other matters. Accordingly, the trial court's judgment of November 1, 1976, predicated upon Section (g) of the April 30, 1975 decree violated the Petitioner's First Amendment Right of



freedom of association and his Fourteenth Amendment right to due process of law.

### CONCLUSION

The trial court's order of June 16, 1976 requiring the Petitioner to appear on July 19, 1976, and establish that he had complied with the conditions set forth in the trial court's order of April 30, 1975 for purging himself of contempt of court, failed to apprise the Petitioner of the charges to be filed and failed to notify the Petitioner that the issue of liability for monetary damages for failure to comply with said conditions would be litigated at the hearing on July 19, 1976. At a minimum, due process requires that an individual charged with the failure to comply with a Court's decree be given reasonable notice of the charges against him and a reasonable opportunity to appear and defend. In the proceedings below the Petitioner was unable to appear and attend and presented an affidavit from his personal physician attesting to the Petitioner's illness. The trial court, however denied the Petitioner's motion for a continuance and thereby deprived the Petitioner of an opportunity to appear and defend himself. Finally, it is clear that the decree of November 1, 1976, entered as a result of the July 19, 1976, hearing, and finding that had failed to purge himself from civil contempt by complying with all of the conditions set forth in the April 30, 1975 decree was a denial of due process, since the Petitioner established his attempt to comply, as well as his inability to comply with all of the conditions set forth therein.

For the reasons stated, Petitioner prays that his Petition for Certiorari to the Supreme Court of the State of Alabama be granted.

Respectfully submitted,

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### PROOF OF SERVICE

Proof of Service of three copies of Petitioner's Petition for Writ of Certiorari to the Alabama Supreme Court upon each of the parties separately represented by counsel was filed by Frank G. Newman, a member of the Bar of the United States Supreme Court, with the Clerk of the United States Supreme Court on the same date the petitions were filed.

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**APPENDIX A**

**JANUARY 25, 1977**

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**SC 2340**

**EX PARTE: SHEARN MOODY, JR., PETITIONER**

**PETITION FOR WRIT OF CERTIORARI**

**(IN RE: CIVIL CONTEMPT PROCEEDINGS ARISING OUT  
OF STATE OF ALABAMA, EX REL. BOOKOUT,  
ETC. V. EMPIRE LIFE INSURANCE COMPANY  
OF AMERICA, ETC.)**

**The petition for writ of certiorari to the Circuit Court of  
Jefferson County being duly submitted to this Court,**

**IT IS CONSIDERED AND ORDERED that the petition be,  
and the same is hereby, denied.**

**IT IS FURTHER ORDERED that costs be taxed against the  
petitioner, Shearn Moody, Jr., for which costs let execution  
issue.**

**Torbert, C. J., Maddox, Faulkner, Jones & Beatty, J. J.,  
Concur.**

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APPENDIX B

February 22, 1977

THE STATE OF ALABAMA . . . JUDICIAL DEPARTMENT  
IN THE  
SUPREME COURT OF ALABAMA  
OCTOBER TERM 1976-77

SC 2340

EX PARTE: SHEARN MOODY, JR., PETITIONER

PETITION FOR WRIT OF CERTIORARI

(IN RE: Civil Contempt Proceedings Arising out of: State of  
Alabama, ex rel. Bookout, etc. v. Empire Life Insur-  
ance Company of America, etc.)

ORDER

IT IS ORDERED that the application for rehearing filed by  
the petitioner in the above matter will not be considered by  
the Court, and said application for rehearing is being returned  
to petitioner.

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APPENDIX C

IN THE  
CIRCUIT COURT OF  
JEFFERSON COUNTY, ALABAMA  
IN EQUITY

STATE OF ALABAMA, EX REL.  
JOHN G. BOOKOUT,  
COMMISSIONER OF INSURANCE,

*Plaintiff,*

*VS.*

EMPIRE LIFE INSURANCE  
COMPANY OF AMERICA, an  
Alabama corporation,

*Defendant,*

*and*

SHEARN MOODY, JR.,

*Intervenor.*

CIVIL ACTION  
NO. 171-687

MEMORANDUM BRIEF OF SHEARN MOODY, JR.

NOW COMES SHEARN MOODY, JR., an Intervenor in the  
above entitled and numbered cause and files this Memorandum  
Brief in compliance with the leave granted by this Honorable  
Court on July 19, 1976, at a hearing conducted on that date to  
determine whether Shearn Moody, Jr. had purged himself of  
contempt of this Honorable Court.

I,

STATEMENT OF FACTS WHICH OCCURRED  
ON JULY 19, 1976.

In November of 1974, a policyholder suit was filed in the  
U.S. District Court for the Middle District of Alabama, styled

*Allmon v. John G. Bookout*, who was then the Receiver for Empire Life Insurance Company of America. Thereafter, on January 6, 1975, this Honorable Court entered an Order which, among other things, enjoined Moody or his attorneys from prosecuting that action or filing any amended complaint therein. Thereafter, an amended complaint was filed in the Allmon suit and this Honorable Court entered an order, holding Moody and certain of his attorneys in contempt. That order was appealed and subsequently affirmed by the Alabama Supreme Court.

On April 30, 1975, the Order holding Moody in contempt was vacated. However, Moody was ordered to "purge himself of contempt" by taking certain actions specified in that Order, a copy of which is annexed.

Pursuant to that Order, Moody appeared before this Honorable Court on May 7, 1975, for questioning and he filed later with this Court a sworn statement, an affidavit of Scott Manley and copies of various telegrams and letters. Manley's attorneys are advised that following that appearance Mr. Tommy Lawson, who represented Mr. Moody at the hearing, was told by Mr. Drayton Nabers, Jr., attorney for Protective Life Insurance Company, that Moody need not fire his previous attorneys, if they would simply get out of the Allmon case.

Pursuant to the April 30, 1975 Order, Moody again appeared before this Honorable Court on May 12, 1975, and was directed to go to the office of the attorney for Protective Life Insurance Company and give his oral deposition, which he did.

Pursuant to the April 30, 1975 Order, Donald L. Collins, A Eric Johnston and the firm of Collins and Johnston, who had previously represented Moody, filed an affidavit herein.

The Order of April 30, 1975 stated that a hearing would be

held on May 19, 1975, to determine the extent and amount of damages sustained by any party by reason of any failure of Moody to comply with the Order of Injunction dated January 6, 1975. However, that hearing was postponed and has never been held.

On December 16, 1975, this Honorable Court signed an Order, stating that the appeal of the Allmon case had been vacated and the cause remanded to the U. S. District Court and that the Court was of the opinion that the Allmon case should proceed in the U.S. District Court to determine whether the case was moot, and that this Court was "committed to avoiding any interference with the Federal District Court's determination of the issue before said Court." The Order of December 16, 1975, "lifted" the injunction against Mr. Allmon and stated that no action would be taken to interfere with his full and active participation in the proceeding in that Court. Because of its significance, a copy of that Order is annexed hereto.

On June 16, 1976, this Honorable Court entered an Order that Moody appear in person before it on July 19, 1976, and then and there demonstrate that he had purged himself of contempt and fully complied with the Order dated April 30, 1975.

## II.

### STATEMENT OF FACTS WHICH OCCURRED ON JULY 19, 1976.

On July 19, 1976, Roy Cohn of the New York Bar was introduced to the Court by Drayton N. James, an attorney for Moody who is licensed to practice in this Honorable Court. Judge



Barber graciously permitted Mr. Cohn to appear on behalf of Mr. Moody. Mr. Cohn presented an affidavit from E. B. Vogel-pohl, Jr., M.D. of Galveston, Texas, which certified that Mr. Moody was ill and unable to appear before this Honorable Court on July 19, 1976. Mr. Cohn respectfully moved orally for a continuance of the hearing to a date at which Mr. Moody was physically able to appear. The Court denied the Motion and ordered that the hearing proceed. The Court granted standing objections to all questions and evidence and standing exceptions.

Mr. Cohn offered certain telegrams and correspondence to show a good faith attempt of Moody to comply with the April 30, 1975 Order, but they were not admitted. The Court stated that it would consider Mr. Moody's deposition, which was taken on May 12, 1975, and anything else which had been filed in the Court. It is submitted that this would include Mr. Moody's affidavit, above-mentioned, the affidavit of Scott Manley, the affidavit of Messrs. Collins and Johnston and the telegrams and correspondence described in I. above.

Mr. Drayton Nabers, Jr., attorney for Protective Life Insurance Company, then proceeded to call Mr. Eric Johnston as his witness and introduced, over objection, Protective's exhibits 1 through 5A. Mr. Johnston's testimony concerned only facts which had occurred prior to April 30, 1975, and exhibits 1 through 5A concerned only matters which allegedly occurred prior to April 30, 1975.

Upon cross examination by Mr. Cohn, Mr. Johnston stated that he had no knowledge of any act done by Mr. Moody in violation of this Honorable Court's Order of April 30, 1975, and that every thing that he had been asked to testify about upon direct examination concerned matters which had occurred prior

to the April 30, 1975 Order. (Pages 65 and 66 of the Transcript.)

Mr. James W. Webb, attorney for the Receiver, then called Mr. Joel S. Dubina, a Montgomery attorney, as his witness. He testified that he had filed a lawsuit against Manley and Moody for a legal fee, arising from the fact that in April of 1975 Mr. Manley came to his office and asked his firm to represent him in an action entitled *Allmon v. Bookout*. He testified that Mr. Manley told him that Mr. Moody would take care of his fee. The Receiver offered in evidence a copy of the Complaint Mr. Dubina had filed, as Receiver's Exhibit 1.

On direct examination, the only work which Mr. Dubina stated that he had done in *Allmon v. Bookout* was to prepare an affidavit for Scott Manley, to be filed in the U. S. Fifth Circuit Court. He stated that he had no personal knowledge of whether it was ever sent to Mr. Manley (page 80 of the Transcript). Mr. Dubina identified, as Receiver's Exhibit no. 2, an affidavit he had filed in his firm's suit against Moody and Manley.

Upon cross examination by Mr. Cohn, Mr. Dubina stated that he had never met Mr. Moody and had never spoken to him, and that Moody by his own word and mouth had at no point retained him or anybody else in his firm to do anything in connection with the Allmon case (pages 84 and 85 of the Transcript). He also testified that Moody had moved to dismiss the suit against him for a legal fee by Mr. Dubina's firm.

After a brief recess, the Court excused Mr. Cohn, who found it necessary to leave for another engagement, but stated that Mr. Cohn had requested leave to file a brief in argument relative to the ruling of the Court. The Court stated that such leave was granted; the same to be filed within one week. The Court stated

that he did not want any further pleadings filed by anybody in this case relative to this contempt hearing, but that he would "accord anybody that wants to furnish the Court with briefs and memoranda based upon what has happened, and will happen up to the termination of this hearing today." (Page 89 of the Transcript.)

Mr. Nabers then introduced as Protective's Exhibit no. 6 the above mentioned affidavit of Moody, at which time the Court acknowledged that the above mentioned doctor's affidavit and the letter attached to same were marked and filed. (Page 90 of the Transcript.)

Mr. Nabers then introduced exhibits 7 and 8, which were affidavits of Messrs. Manley and Moody, which had been filed in a lawsuit by Collins and Johnston v. Moody for a legal fee and which pertain to actions taken by that law firm prior to April 30, 1975.

Mr. Nabers then introduced a deposition which had been taken of Mr. Allmon on January 16, 1975, more than 3 months prior to the April 30, 1975 Order. This was marked Exhibit 10. He then introduced as Exhibit 11 a deposition which had been taken of Mr. Allmon on March 25, 1976, at which Mr. Moody was neither present nor represented.

Mr. Nabers stated that he would later produce and offer as exhibits 12 and 13, transcripts of what had occurred at the hearings conducted by this Court on January 6, 1975 and March 10, 1975. The Court indicated that he could do so within the aforementioned one-week period.

Mr. Nabers then called Mr. William A. Robinson of his own law firm who identified Protective's exhibit 14 as a Motion of John S. Bleeker, Jr. for intervention in the Allmon suit in the

United States District Court. It was filed in February 1975, prior to the April 30, 1975 Order of this Honorable Court. He also identified exhibit 13 as an application for intervention of Mr. Bleeker, received by him in February 1975. Exhibits 14 and 15 are signed by Mr. Manley, as attorney for Mr. Bleeker. Mr. Robinson identified as exhibit 16 an Amendment to the Complaint in the Allmon case which he stated was filed in the last week of January 1975. He identified as exhibit 17 a Motion to Expedite Appeal of Allmon v. Bookout, filed in the U. S. District Court on May 5, 1975. He identified a Motion for Protective Order from the same Court on May 5, 1975, bearing the signatures of Scott Manley, Martin Paul Solomon and Eugene Gressman, which was marked as exhibit 18. Mr. Robinson next identified as exhibit 19 a Motion to Reinstate Appeal of John S. Bleeker in the Allmon case, filed by Edward Still, as his attorney, to which were attached Affidavits as to factual matters of Scott E. Manley, Martin Paul Solomon and Daryl Fanelli. He next identified as exhibit 20 an Affidavit of Scott Manley, filed in the United States Court for the Fifth Circuit in the Allmon case, dated November 12, 1975, in which, among other things, Mr. Manley stated that he had previously represented Mr. Allmon and Mr. Bleeker in that case. The affidavit was in response to information furnished the Clerk of that Court by a letter dated November 5, 1975 from James W. Webb and concerning Mr. Manley's past activities as an attorney for Mr. Bleeker in that case. Protective's exhibit 21 consisted of several affidavits received by Mr. Robinson in October of 1975 in opposition to a Motion he had filed to dismiss the Allmon Appeal in the Fifth Circuit Court. Exhibit 22 was identified as a letter from Mr. Manley to Judge Robert E. Varner, dated June 8, 1976 and



exhibit 23 was a letter to Judge Varner from Martin Paul Solomon dated June 7, 1976. Mr. Robinson then identified as exhibit 24 a Judgment signed by Judge Varner, dated June 28, 1976, dismissing the Allmon suit.

Mr. Robinson testified that Mr. Manley and Mr. Solomon appeared before Judge Varner at a hearing in December of 1975 and argued that the effect of Judge Barber's Injunction Order was to prevent their appearing as attorneys for Mr. Allmon because of their representation of Mr. Moody. (Page 125 of the Transcript.) Mr. Robinson testified that Mr. Solomon had represented Mr. Moody in the Alabama Supreme Court in an Appeal from the January 6, 1975 Injunction Order of this Honorable Court and that he had made a "conclusion" that Mr. Manley represented Mr. Moody after April 30, 1975. (Page 129 of the Transcript.) Mr. Robinson also testified from cross examination that he had no knowledge of any financial support of Mr. Manley by Mr. Moody after the date of Mr. Moody's deposition (which was taken on May 12, 1975). (Page 131 of the Transcript.) Mr. Nabers became a witness and identified as exhibit 25 a letter from the Clerk of the United States District Court in the Allmon case, to the attorneys of record in that case, saying that Mr. Norman Reeve had requested a transcript. He identified as exhibit 26 a copy of a Summons and Complaint in a suit filed by Willie Allmon against Protective Life Insurance Company in Arkansas on January 26, 1976. That Complaint does not name at any place Mr. Moody or any of the above mentioned attorneys who may have represented Mr. Moody at any time.

### III.

#### **BRIEFS AND MEMORANDA BASED UPON WHAT HAS HAPPENED IN THE PAST.**

After the hearing on July 19, 1976, and contrary to the Court's direction that no additional pleadings be filed herein, the Receiver, on July 20, 1976, filed an instrument entitled "Amendment to Petition for Damages" in which he requested that damages be assessed against Moody in the amount of one million dollars (\$1,000,000); and in which he states that "on information and belief" Moody after April 30, 1975, continued to finance, assist and aid the Allmon suit by employment of the law firm of which Mr. Dubina is a member and by retaining and paying expenses of Scott Manley, Martin Paul Solomon and Edward Still.

Pursuant to the Court's statement that memoranda and briefs may be filed within one week from July 19, 1976 concerning "what has happened and what will happen to the termination of the hearing" the attorneys for Moody have filed with this Honorable Court the following:

1. This brief:
2. A certified copy of all documents filed in the United States District Court for the Fifth Circuit in the Allmon case after April 30, 1975.
3. A certified copy of all documents filed in the United States District Court for the Middle District of Alabama in the Allmon case after April 30, 1975.
4. The affidavit of Shearn Moody, Jr., pursuant to the April 30, 1975 Order, to which are attached an additional affidavit from Dr. Vogelpohl, giving more specific details as

to Mr. Moody's illness on July 19, 1976 and affidavits of Saxe, Bacon and Bolen and of Dale Major, as required by the April 30, 1975 Order, as well as copies of other documents predating the hearing on July 19, 1976, evidencing Moody's attempt to comply with the April 30, 1975 Order.

#### IV.

##### ARGUMENT AND AUTHORITIES

##### 1. THE CASE SHOULD HAVE BEEN CONTINUED.

Mr. Roy Cohn came to Birmingham from New York at Moody's request and he advised the Court that he had represented Mr. Moody in a number of matters over a period of time and that he had been recently requested to represent him at this hearing and that he had come to Birmingham expressly and solely for the purpose of presenting the Affidavit of Mr. Moody's physician, which evidenced that he was ill and unable to appear before Court. No one would have been prejudiced by such continuance and such a continuance would have made it possible for Moody to appear in person to present evidence of the most serious charge which has been made of him: contempt of this Honorable Court.

Instead, the hearing commenced and evidence was admitted of which Moody had no prior notice, including documents which represented that others had taken action in the Allmon case. The connection was alleged to be that they were at the same time Moody's agents. Surely, at this point in time, the hearing should have been continued until Moody was physically able

to bring in evidence, in the interest of a full and fair hearing and in the interest of justice. His attorneys at the hearing had not previously seen any of the pleadings or affidavits offered in evidence, which had been filed by others in the Fifth Circuit Court or the U. S. District Court in the Allmon case after April 30, 1975. The Court should have given them the opportunity for testimonial contradiction or explanation of such documents, which are urged by Protective and the Receiver to show contempt of this Honorable Court by Moody, even though none of those documents bear his name.

In connection with Moody's failure to appear, Moody would point out that when he was physically able to do so he has in fact, personally appeared before this Court. On May 7, 1975, he appeared before this Court and pursuant to this Court's command appeared again in Alabama on May 12, 1975, for an oral deposition. In connection with the hearing set by this Court on March 10, 1975, Moody, through his attorneys, indicated that he was too ill to appear at that hearing. It would be unreasonable, indeed, to hold that Moody has not purged himself of contempt and to hold him in further contempt of this Court since he has demonstrated that he was unable to comply with this Court's Order. See, *Natural Resources Defense Counsel, Inc. v. Train*, 510 F.2d 692 (D.C. Cir. 1974); *Brotherhood of Loc. Fire and Eng. v. Bangor & Aroostock, R. Co.*, 380 F.2d 570 (D.C. Cir. 1967) *cert. den.* 389 U.S. 327; *F.T.C. V. Blaine*, 308 F. Supp. 932 (N.D. Ga. 1970).

##### 2. A CERTIFIED COPY OF THE PLEADINGS AND DOCUMENTS FILED IN THE FIFTH CIRCUIT AND THE U.S. DISTRICT COURT IN THE ALLMON CASE AFTER



APRIL 30, 1975, DO NOT SUPPORT THE ARGUMENT THAT MOODY HAS BEEN IN CONTEMPT OF THIS HONORABLE COURT.

It is true that on May 5, 1975, a few days after the April 30, 1975 Order of this Court, a Motion to Expedite Appeal and a Motion for Protective Order were filed in the Fifth Circuit Court and signed by Scott E. Manley and Martin Paul Solomon and Eugene Gressman. Neither Mr. Solomon nor Mr. Gressman is named in the April 30, 1975 Order of this Court. No showing was made that Mr. Manley even knew of the April 30, 1975 Order at the time the May 5, 1975 documents were filed in the Fifth Circuit Court. In addition, no showing was made as to when Mr. Moody learned of the April 30, 1975 Order and there is no recitation in that Order that anyone was present when the same was entered. This Honorable Court has previously acknowledged that Mr. Moody resides in Galveston, Texas.

A certified copy of the record of the Fifth Circuit shows that on July 21, 1975, Scott E. Manley, on behalf of himself and Jones, Murray, Stuart and Yarbrough (Mr. Dubina's firm), Martin Paul Solomon and Eugene Gressman filed a Motion for Leave to Withdraw as counsel in the Allmon case on account of the Order of this Court of April 30, 1975. The pleadings in the Fifth Circuit also show that such motion was granted and that Edward Still became attorney for the Appellants. Thereafter, the only documents filed in the Fifth Circuit signed by Mr. Manley or Mr. Solomon were affidavits, as witnesses to facts. In his affidavit of October 29, 1975, Mr. Manley stated that he had "previously appeared as an attorney of record in the aforesaid cause for Appellants Allmon and John S. Bleeker, Jr." The certified documents from the Fifth Circuit evidence that a ques-

tion arose last fall as to whether the attorneys for the Appellants had diligently filed transcripts and paid the filing fees when the case was first brought up on appeal and prior to their withdrawal as attorneys for the Appellants. The affidavits of Scott Manley and Martin Paul Solomon were as witnesses in the case and in defense of the charges made against them by Protective and the Receiver that they had previously been negligent. However, it was Edward Still who continued as the attorney for the Appellants to the date that the case was remanded to the United States District Court.

In his affidavit which was attached to a Motion to Reinstate the Appeal in Fifth Circuit, which Motion was filed by Edward Still, Mr. Solomon stated that he had withdrawn from the Allmon case on April 24, 1975.

The certified copies of documents filed in the United States District Court for the Middle District of Alabama after April 30, 1975 in the Allmon case show clearly that Mr. Still was the attorney for the Plaintiffs, not Mr. Manley nor Mr. Solomon. The same papers show that on December 18, 1975, Mr. Still moved for a Protective Order in the United States District Court forbidding the Circuit Court for Jefferson County, Alabama, from taking any action to restrict the participation from attorneys retained by Mr. Allmon in that suit. The United States District Court denied that the Protective Order by an order in which that Court observed that "Judge Barber modified the Original Injunction by entering an Order on December 16, 1975, which stated that no action will be taken to interfere with Willie Allmon's active and full participation in the proceedings on the mootness question."

It is interesting to note that from the pleadings filed in the

United States District Court Protective Life Insurance Company filed an "Answer to Motion for Protective Order" on December 30, 1975, in which it is stated that the attorneys for Bookout and Payne presented a proposed order to Judge Barber which had been orally approved by him, which would entitle Mr. Allmon to proceed in the U.S. District Court with any attorneys of his choice.

The fact that Mr. Manley and Mr. Solomon each wrote a letter to Judge Varner in June of 1975 (Protective's exhibits 22 and 23) is of no significance. On May 31, 1976, Mr. Nabers and Mr. Robinson as attorneys for Protective Life Insurance Company, sent a letter to Judge Varner, submitting proposed Findings of Fact and Conclusions of Law. A copy of that letter and a proposed Findings of Fact and Conclusions of Law were sent to Scott Manley and a copy was sent to Mr. Paul Solomon, as well as Mr. Edward Still and others. Protective thus invited their comments which were sent by Mr. Solomon's letter and Mr. Manley's letter to the Judge. Mr. Solomon stated in the first paragraph of his letter that he had appeared as counsel for Mr. Allmon until he was forced to withdraw when the case was pending in the Fifth Circuit. In Mr. Manley's letter to Judge Varner, again in response to the letter of May 31, 1976 from Mr. Nabers and Mr. Robinson, Mr. Manley makes it clear that he had represented Mr. Bleeker, and Intervenor whose appeal had been dismissed by the Fifth Circuit Court on June 24, 1975.

The record after April 30, 1976 in the Fifth Circuit and in the U. S. District Court in the Allmon case is clear that soon after they learned of this Honorable Court's Order of April 30, 1975, both Mr. Manley and Mr. Solomon withdrew from the

case and Mr. Still became the only attorney for the Appellants-Plaintiffs.

There was no evidence that Mr. Moody ever paid Mr. Still or had anything to do with his employment. Nor is there anything in the record to show that Mr. Moody compensated Mr. Manley or Mr. Solomon after April 30, 1975, for any services in connection with the Allmon case.

**3. MOODY HAS A CONSTITUTIONAL RIGHT TO RETAIN COUNSEL OF HIS CHOICE. THUS, THIS COURT EXCEEDED ITS AUTHORITY IN ORDERING MOODY TO TERMINATE ALL REPRESENTATION BY CERTAIN DESIGNATED ATTORNEYS.**

The April 30, 1975 Order provided that Moody could purge himself of contempt by, among other things, terminating immediately all employment of certain attorneys designated in such Order. Although no evidence was introduced to show that Moody failed to do this, Moody submits that the Order is overbroad in that it requires as a condition to Moody's purging himself that he terminate further representation by the designated attorneys in cases other than *Allmon v. Bookout*, the subject matter of the contempt order. Moody submits that under the Constitution of the United States and under the laws of Alabama, he has a right to be represented in cases other than Allmon by attorneys of his own choosing. Accordingly, Moody submits that this Court exceeded its authority in ordering Moody to terminate all employment whatsoever with respect to certain attorneys enumerated in this Court's Order, and that such an Order cannot and should not be a condition of the purging of contempt.

It cannot be disputed that every person has an absolute right to be represented by attorneys of his own choosing. *Swartz v.*



*Swartz*, 76 S.W.2d (1971 Tex.Civ.App. — Dallas, 1934); *Roberts v. Anderson*, 66 F.2d 874 (10th Cir. 1933); *United States v. Certain Parcels of Land in Price George County, Maryland*, 40 F. Supp. 436 (D.Md. 1941); *Arnold v. Ft. Worth & D.S.R. Railway Company*, 8 S.W.2d (298 Tex.Civ.App. — Amarillo, 1948); *Universal Athletics Sales Company v. American Gym, Recreational and Athletic Equipment Corporation, Inc.*, 357 Supp. 905 (W.D.Pa. 1973).

This right to be represented by counsel of one's own choosing flows not only from the common laws of the various states but also from the Due Process Clause of the United States Constitution. In addition, the First Amendment to the United States Constitution guaranteeing freedom of speech, assembly, and petition also guarantees any person the right to association with attorneys of his choosing. For this reason, in *United Mine Workers of America, District 12 v. The Illinois State Bar Association*, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967), U.S. Supreme Court held that the Illinois State Bar Association was precluded under the First Amendment to prohibit a union from hiring attorneys of its choice on a salary basis to assist the members in prosecuting workmen compensation claims. Any court order which prohibits a person from obtaining counsel of his choice is beyond that court's authority and is void. *Selvy v. Jacobucci*, 142 Colo. 53, 349 P.2d (567, 1960).

In the *Selby* case, an attorney was employed by a juvenile to represent the juvenile in a delinquency proceeding. The parents of the juvenile filed a petition to prohibit the representation and the court entered an order precluding the attorney from representing the juvenile. The Colorado Supreme Court held that the juvenile had selected counsel of her own choosing, that the

juvenile had an absolute right to a counsel of her own choosing, and that thus the court's order prohibiting the attorney from appearing and representing this client was beyond the court's jurisdiction and void.

Similarly, Moody submits this Court exceeded its jurisdiction and authority by ordering Moody to terminate for any purpose in any actions the enumerated attorneys. Such an order effectively denies Moody the right to representation by attorneys of his own choosing. For the reasons stated above, this Court should not and can not ask Moody to take such action and then find that Moody has not purged himself if he does not do so.

#### 4. MOODY HAS SUBSTANTIALLY COMPLIED WITH THE APRIL 30, 1975 ORDER AND NO SHOWING HAS BEEN MADE OF ANY FAILURE TO DO SO.

The April 30, 1975 Order expressly stated in the last paragraph that the Court's Order of March 10, 1975 finding Moody in Civil Contempt of the January 6, 1975 Injunction was vacated.

However, in Section 2 of the Order, Moody was directed to do all the things specified in (a) through (j). There has been absolutely no showing that Moody has failed to do anything except appear before this Honorable Court on July 19, 1976. However, for reasons stated above, a clear showing was made at that time that Moody was physically unable to so appear and certainly this Honorable Court would not direct anyone to take an action which would seriously endanger his health.

Moody was required by the April 30, 1975 Order to file sworn statements as to fees paid by him to certain attorneys and a sworn statement concerning meetings and conferences he had attended concerning the Allmon case. That affidavit was filed in this Honorable Court and clearly did just that. It is believed that



such affidavit was transmitted to Judge Barber by a letter dated July 25, 1975, which was longer than the ten-day period specified in the April 30, 1975 Order, but no objection to that delay has heretofore been made by anyone.

The same letter from Moody to Judge Barber included telegrams, evidencing clearly a good faith attempt by Moody to comply with the April 30, 1975 Order. One was a telegram from Dale R. Major, stating that he had withdrawn from the Allmon case which was dated May 12, 1975. Another was a telegram from Eugene Gressman dated May 11, 1975, stating that he had withdrawn all connections and representations in the Allmon case. Another was a telegram to Moody from Collins & Johnston, dated May 9, 1975, stating that they were preparing the accounting for the legal fees and expenses as required by the Court's Order. The same was subsequently filed in affidavit form in this Court. Another such telegram was dated May 12, 1975, from Scott Manley stating that he had withdrawn from the Allmon case and that he was preparing formal papers and that he had discharged local counsel who were similarly withdrawing. As stated above, the Motion for Leave to Withdraw was subsequently filed and granted. Another such telegram was from Dale R. Major dated May 9, 1975, in which he stated that he would furnish the itemization and detail of fees paid him and disbursements made by him. Another was a letter from Manley to Moody dated May 8, 1975, stating that he would furnish the detail on fees and expenditures, as required by the April 30, 1975 Order. Another is a letter from Moody to Saxe, Bacon, Bolen and Manley dated May 9, 1975, requesting the aforementioned fee information.

Moody was requested by the April 30, 1975 Order to require

such fee information and the record is clear that he did so. The Collins and Johnston affidavit was filed last year and it is understood that the Scott Manley affidavit was filed last year. At the hearing on July 19, 1976, Moody's attorneys offered in evidence a letter from Roy Cohn to Moody stating that no amount had been paid Saxe, Bacon & Bolen by Moody in connection with the Allmon case. This was not admitted, although Cohn was present at the time.

Admittedly, although Moody was ordered to require such sworn statements from such attorneys, they have not heretofore been furnished by Saxe, Bacon and Bolen, nor by Dale R. Major. This is true because they were simply not received by Moody although they were requested. They are now attached to an affidavit filed herewith and on this date by Shearn Moody, Jr. pursuant to the Court's Order of April 30, 1975.

In compliance with the Court's Order of April 30, 1975, Moody appeared before the Court on May 7, 1975 and on May 12, 1975 and on the last mentioned dates submitted to an oral deposition by Order of the Court.

How, then, can it be seriously contended that Moody has failed to purge himself of contempt of this Court? It simply cannot. The only evidence offered by Protective or the Receiver concerned: (a) actions prior to April 30, 1975, and (b) actions by only Manley and Solomon after April 30, 1975. The evidence concerning their actions was presented in a completely distorted fashion by taking only parts of the records before the Fifth Circuit Court and the U. S. District Court of the Middle District of Alabama and presenting them out of context. Furthermore, of all the pleadings and orders entered in such courts after April 30, 1975, certified copies of which have been filed in this

Court herewith, it is clear that Manley and Solomon withdrew from the Allmon case; that they were required to defend their prior actions concerning the transcript and filing fee and did so by mere affidavits as witnesses. Surely this Court did not direct that Moody's attorneys or ex-attorneys never appear as witnesses in an Allmon or Allmon-related case.

After they withdrew from the Allmon case, while it was pending in the Fifth Circuit Court, the case was remanded to Judge Varner and they appeared before him and said they were unable to represent Mr. Allmon, because of the April 30, 1975 Order. The documents from that court reflect that in December 1975 there was some consternation as to who, if anyone, should represent Mr. Allmon and, indeed, whether Mr. Allmon could be a party to the suit, in view of the prior orders of this Honorable Court. This was solved by this Honorable Court's Order of December 16, 1975 which is annexed. It clearly sanctioned the continuation of the case by Mr. Allmon, and presumably by attorneys of his choice. (How else could he proceed?) However, even thereafter Manley and Solomon refused to renew or take up their representation of Allmon. When Protective mailed copies of the proposed Findings of the Facts and Conclusions of Law to both Manley and Solomon, by its attorneys' letter of May 31, 1976, it invited their comments to Judge Varner which were submitted in the clear capacity as former attorneys, who had withdrawn from the case. How can Protective now complain of an act it requested?

No showing has been made that Moody knew anything whatsoever about what was going on in the Allmon case after April 30, 1975, except for those facts stated in his own Deposition and Affidavit, aforementioned. No showing was made that

Manley represented Moody after the date of Moody's Deposition and Affidavit. The only showing of representation by Moody of Solomon was before the Alabama Supreme Court in the appeal of the January 6, 1975 Order.

#### 5. MOODY HAS THE RIGHT TO A JURY TRIAL.

The April 30, 1975 Order provided that a hearing would be had to determine the compensatory damages to be paid by Moody to Protective and the Receiver. That hearing was not then held and has not been held. Whenever it is held Moody has a right to a jury trial on the issue of the existence and the amount of compensatory damages, if any. This is clearly established by the Alabama Supreme Court in *Lightsey v. Kensington Mortgage and Finance Corporation*, 315 So.2d 431 (Ala. 1975). As the Alabama Supreme Court indicated at 436-7:

We know of no statute or decision of this court that has ever authorized a circuit court to impose a fine as indemnity or as compensatory damages to the adverse party in the civil action. We think the question of the amount of unliquidated damages should be regularly tried so that the dissatisfied party could have an initial review by an appeal rather than by a writ of certiorari. An indemnity or a compensatory award of damages must be determined in an ancillary proceeding and is not permissible as an integral part of the court's adjudication of contempt in the circuit courts of this state.

\* \* \*

. . . we believe either party on demand would be entitled to a jury trial on the issue of damages. We perceive of no reason why this cannot be afforded in the same proceeding on petition of the aggrieved party seeking damages after the finding by the trial court that the opposite party is in contempt. A jury would be impaneled to hear the evidence on such petition and determine whether damages, compensatory or punitive, should, under the usual rules, be imposed.

Accordingly, before Moody will be able to purge himself of contempt by satisfying the condition (i) set forth in the order of April 30, 1975, Moody demands and insists that a jury trial be had upon the issue of the damages allegedly suffered by Protective and the Receiver as a result of his alleged contempt.

### CONCLUSION

Moody has shown a good faith effort to comply with the April 30, 1975 Order of this Court. There has been no showing that he has failed to purge himself of contempt and the Order of Contempt itself was vacated.

Although the December 16, 1975 Order of this Court made it clear that this Court was committed to not interfere with U. S. District Court's handling of the Allmon case and that Allmon could proceed in that action, Manley and Solomon continued to refrain from representing Allmon.

There is not one shread of evidence that Moody has had anything to do with the Allmon case after April 30, 1975. The only thing he has failed to do was to appear before this Honorable Court on July 19, 1976, for the reason that to do so would seriously endanger his health, as clearly shown by the affidavit of Dr. Vogelpohl stating that he had seen Moody since March 2, 1976; that he has had a severe hypertension, at one time classified as malignant; that he had hypertension on July 15, 1976 and allergic rhinosinusitis, acute gastroenteritis, and acute viral infection, and acute pharyngitis and acute tonsilitis! If this is not a reasonable excuse for his absence, then, indeed, it is believed that no reasonable excuse could ever be supplied for the failure of a party to appear before a Court.

Moody respectfully prays that this Honorable Court not find

him in contempt. He has not intentionally violated the April 30, 1975 Order and has done all that any reasonable person could do to comply with it.

Respectfully submitted,

Roy Cohn of  
SAXE, BACON & BOLEN  
39 East 68th Street  
New York, New York

/s/ FRANK G. NEWMAN  
Frank G. Newman  
NEWMAN, SHOOK & NEWMAN  
4330 Republic Bank Tower  
Dallas, Texas 75201

/s/ DRAYTON JAMES  
Drayton James  
Attorney at Law  
Frank Nelson Building, Suite 817  
Birmingham, Alabama

I certify that a copy of the foregoing Brief and the affidavit of Shearn Moody, Jr. described therein were mailed to Drayton Nabers, Jr. and James Webb this 26th day of July, 1976.

/s/ DRAYTON JAMES  
Drayton James



**APPENDIX D**  
**IN THE SUPREME COURT OF ALABAMA**  
**CASE NO. \_\_\_\_\_**

EX PARTE SHEARN MOODY, JR.,  
*Petitioner,*

IN RE: Civil contempt proceeding  
arising out of:

STATE OF ALABAMA, EX REL.  
JOHN G. BOOKOUT, COMMISSIONER  
OF INSURANCE  
*Plaintiff,*

*vs.*

EMPIRE LIFE INSURANCE COMPANY  
OF AMERICA, AN ALABAMA  
CORPORATION,  
*Defendant.*

Circuit Court Case Number 171-687,  
Circuit Court of Jefferson County, Alabama

**PETITION FOR WRIT OF CERTIORARI**

CLARK & JAMES  
817 Brank Nelson Building  
Birmingham, Alabama 35203  
NEWMAN, SHOOK & NEWMAN  
4330 Republic National Bank Tower  
Dallas, Texas 75201  
ROGERS, HOWARD, REDDEN & MILLS  
1033 Frank Nelson Building  
Birmingham, Alabama 35203  
*Attorneys for Petitioner*

**TO THE SUPREME COURT OF ALABAMA:**

Comes now the Petitioner, Shearn Moody, Jr., and petitions the Court for a writ of certiorari to the Circuit Court for Jefferson County, Alabama, and in support of his petition respectfully represents and shows unto the Court as follows:

**Purpose and Grounds for Petition**

1. This petition for a writ of certiorari is filed as an alternative means of reviewing an "Order and Decree" rendered by the Circuit Court of Jefferson County, Alabama, on November 1, 1976. A copy of the said "Order and Decree" is attached as Exhibit 1 to this petition. The Petitioner has filed notice of appeal to the Supreme Court of Alabama from the said "Order and Decree". If it be determined that appeal is not in the proper procedure for reviewing the said judgment this petition for writ of certiorari is filed as an alternative.

**Parties**

2. Petitioner is over the age of 21 years and is a resident citizen of the State of Texas.

3. Protective Life Insurance Company is a corporation organized and existing under the laws of the State of Alabama.

4. The Honorable William C. Barber is a Judge of the Circuit Court of Jefferson County, Alabama, and was the judge who presided over the proceedings hereinafter described and was the judge who rendered the judgment which this petition seeks to review.

5. Charles H. Payne, the Commissioner of Insurance of the State of Alabama, is Receiver of Empire Life Insurance Company of America by appointment of the Circuit Court of Jeffer-

son County, Alabama, in a case designated as Case Number 171-687 and styled "State of Alabama, ex rel Charles H. Payne, Commissioner of Insurance, Plaintiff vs. Empire Life Insurance Company of America, Defendant."

#### Statement of Facts

6. On June 16, 1976, the Circuit Court of Jefferson County, Alabama, the Honorable William C. Barber, Circuit Judge, presiding, entered an order *ex mero motu* directing the Petitioner to appear before that Court on July 19, 1976, and demonstrate whether or not he had purged himself of civil contempt of that court and had fully complied with an order of that court entered on April 30, 1975. A copy of the said order dated June 16, 1976, is attached hereto as Exhibit 2 to this petition. A copy of the said order entered on April 30, 1975, is attached hereto as Exhibit 3 to this petition.

7. A hearing was held before the said court on July 19, 1976. Following this hearing, and on November 1, 1976, the trial court entered a judgment styled "Order and Decree", a copy of which is attached hereto as Exhibit 1 to this petition.

8. At the time of the said hearing on July 19, 1976, the action referred to in the said "Order and Decree" of November 1, 1976, as the "Allmon" case had been finally terminated.

9. At the time of the said hearing on July 19, 1976, the receivership proceeding designated as Civil Action Number 171-687 in the Circuit Court of Jefferson County, Alabama which is referred to in the "Order and Decree" of November 1, 1976, had been terminated and the reinsurance agreement, which is also referred to in the said "Order and Decree," had been consummated.

#### Issues Presented for Review

10. The issues presented for review by this petition are as follows:

(a) Whether a civil contempt proceeding may be maintained after the orders and decrees which it purports to enforce or aid in enforcing have been fully executed.

(b) Whether a party adjudged guilty of civil contempt can be ordered to pay all costs and expenses incurred by reason of the investigation, preparation for, and conduct of civil contempt proceedings against him.

(c) Whether a party adjudged guilty of civil contempt can be ordered to pay attorneys' fees incurred by the parties bringing the contempt action against him.

(d) Whether a party adjudged guilty of civil contempt can be required to pay all costs, damages, and expenses incurred by other parties to the action as a result of his failure to purge himself of civil contempt.

(e) Whether or not the evidence supports the findings and orders of the said "Order and Decree" dated November 1, 1976.

#### Relief Sought

11. The relief sought by this petition is as follows:

(a) An order vacating and setting aside the judgment entitled "Order and Decree" dated November 1, 1976.

(b) An order rendering judgment in favor of the Petitioner on the matters described in the said "Order and Decree" dated November 1, 1976, and terminating further civil contempt proceedings against the Petitioner arising out of the said receivership proceeding designated as Civil Action Number 171-687 in the Circuit Court of Jefferson County.

(c) Such other relief as may be appropriate in the premises.

WHEREFORE, THE PREMISES CONSIDERED, the Petitioner prays that the Court will grant this petition for a writ of certiorari, that Protective Life Insurance Company and the Honorable William C. Barber, Circuit Judge, be made respondents to this proceeding, that the Register of the Circuit Court of Jefferson County, Alabama, be directed and required to prepare and transmit to this Court a full and complete record or transcript of all proceedings therein, including a court reporter's transcript of all evidence and proceedings, including pre-trial hearings on motions, duly certified, so that this Court may review the said cause. And Petitioner prays that pending a determination by this Court of this matter that this Court will make and enter an order suspending the execution of the said judgment of the Circuit Court of Jefferson County, Alabama, until this Court decides the issues presented by this petition. And Petitioner prays for such other, further, different, or general relief as he may be entitled to in the premises.

CLARK & JAMES  
817 Frank Nelson Building  
Birmingham, Alabama 35203

NEWMAN, SHOOK & NEWMAN  
4330 Republic National Bank Tower  
Dallas, Texas 75201

ROGERS, HOWARD, REDDEN & MILLS  
1033 Frank Nelson Building  
Birmingham, Alabama 35203  
/s/ WILLIAM H. MILLS  
*Attorneys for Petitioner*

STATE OF ALABAMA }  
JEFFERSON COUNTY }

Before me, the undersigned authority in and for said County in said State, personally appeared William H. Mills, who is known to me, and who by me being first duly sworn deposes and says that he is one of the attorneys for the Petitioner in this cause, that he has read the averments of the foregoing petition and that the averments of fact stated therein are true and correct to the best of his knowledge, information, and belief.

/s/ WILLIAM H. MILLS  
William H. Mills

Sworn to and subscribed before me, this 23rd day of November, 1976.

/s/ PAULA K. SAMPLE  
Notary Public

#### CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing Petition for Writ of Certiorari upon the Honorable William C. Barber, Circuit Judge, upon Cabaniss, Johnston, Gardner, Dumas & O'Neal, counsel for Protective Life Insurance Company, and upon James Webb, counsel for Charles H. Payne, Commissioner of Insurance of the State of Alabama, as Receiver of Empire Life Insurance Company of America, by mailing a copy of the same to each of them, properly addressed and with sufficient postage prepaid, this 23rd day of November 1976.

/s/ WILLIAM H. MILLS  
Of Counsel for Petitioner



**EXHIBIT I**  
**IN THE**  
**CIRCUIT COURT OF JEFFERSON COUNTY**  
**EQUITY DIVISION**

STATE OF ALABAMA, Ex Rel.  
JOHN G. BOOKOUT,  
COMMISSIONER OF INSURANCE,  
*Plaintiff,*

*vs.*

EMPIRE LIFE INSURANCE COMPANY  
OF AMERICA, an Alabama  
corporation,

*Defendant,*

and

SHEARN MOODY, JR.,  
*Intervenor.*

CIVIL ACTION  
NO. 171-687

**ORDER AND DECREE**

This cause came before the Court for evidentiary hearing on July 19, 1976 pursuant to order of the Court entered June 16, 1976. Having carefully considered the documentary evidence adduced at said hearing, oral testimony of witnesses, and argument of counsel, the Court is of the opinion that the following findings, conclusions, order and decree are due to be and hereby are entered in this cause.

1. By Order entered June 16, 1976, this Court ordered Shearn Moody, Jr., a party to this action, to appear before the Court on July 19, 1976, and then and there demonstrate to the Court that he had purged himself of civil contempt of this Court

and had fully complied with the Order of this Court entered on April 30, 1975, which Order adjudicated Moody in civil contempt based on uncontested evidence, *inter alia*, that

(a) Moody knowingly and willfully disobeyed and ignored the provisions of an Injunction entered by this Court on January 6, 1975 by sponsoring, aiding, and controlling the filing of an amended complaint in a lawsuit entitled *Willie Allmon, etc. v. John G. Bookout, et al.*, Civil Action No. 74-377-N (U.S. District Court for the Middle District of Alabama), without seeking or obtaining leave of this Court to do so as required by said Injunction.

(b) The filing and prosecution of the *Allmon* case directly and adversely affected the affairs of Empire Life Insurance Company of America ("Empire"), its receivership, its Receiver, and the implementation of the orders and decrees of this Court.

2. On July 19, 1976, at the time and place specified, Moody failed to appear. Three of Moody's attorneys were present, however, and sought to explain Moody's failure to attend. The explanations offered were wholly insufficient to explain Moody's failure to appear. Moody made no effort prior to the July 19, 1976 hearing to seek a continuance, though one of his attorneys did request, during the course of the hearing, the opportunity to present some testimony that he might find appropriate at some later date. The Court denied such request. Moody had ample opportunity prior to said hearing to arrange for the attendance of any witnesses whose testimony he desired and to procure and develop any other evidence he intended to offer. Moody was represented by three attorneys, two of whom, Messrs. Newman and James, this Court knows to be fully knowledgeable concerning all developments in this proceeding.

3. No substantive evidence was offered on behalf of Moody to demonstrate that he had complied with the April 30, 1975 Order or that he had otherwise purged himself of civil contempt of this Court.

4. Having carefully considered voluminous documentary evidence, the testimony of witnesses, and argument of counsel, the Court is of the opinion that there exists clear and convincing, undisputed evidence that

(a) Moody, by and through his attorneys and agents, in flagrant violation of this Court's Orders of January 6, 1975 and April 30, 1975 continued to aid, assist, support and control the prosecution and maintenance of the *Allmon* litigation up until June 1976, at which time said action was ultimately dismissed by the federal district court as moot.

(b) The *Allmon* complaint was prepared by one of Moody's attorneys of record in this case with the active assistance of Moody himself; his house counsel (Scott E. Manley); his administrative assistant (Norman Revie); and a law clerk for Moody's house counsel (Darryl L. J. Fanelli).

(c) The *Allmon* complaint, as amended, was filed by Darryl Fanelli, law clerk to Moody's house counsel, whose legal education is being financed by Moody and his house counsel. The cost of serving the *Allmon* complaint, as amended, was billed to Moody. Alabama attorneys were hired by Moody to handle Empire-related litigation for him in Alabama, including the *Allmon* case, at a retainer of \$1500.00 per week.

(d) Moody signed an indemnity agreement purporting to hold certain of his Alabama attorneys harmless from any liability based on violation of the Order and Injunction entered

herein on January 6, 1975, which prohibited, *inter alia*, the filing of the amended complaint in *Allmon* without prior approval of this Court.

(e) In April 1975 Moody's house counsel employed Montgomery attorneys to represent Moody in continuing prosecution of the *Allmon* case. Moody's counsel represented that Moody would take care of all attorneys' fees incurred. The Montgomery attorneys thus employed on behalf of Moody continued to prosecute the *Allmon* action on behalf of Moody after April 1975.

(f) After issuance of the April 30, 1975 Order, Moody's house counsel and other Moody attorneys sought federal court review of said Order by the Fifth Circuit Court of Appeals, in connection with the appeal from the district court's entry of summary judgment in the *Allmon* action. Moody's attorneys also sought injunctive relief from the federal appeals court enjoining implementation of the Order entered by this Court on April 10, 1975. The pleadings and papers filed by Moody's house counsel and other Moody lawyers in connection with the *Allmon* appeal further acknowledged that Moody had employed attorneys to prosecute the *Allmon* action and that the attorneys so employed were due to be discharged under the terms of the April 30, 1975 Order of this Court.

(g) Numerous affidavits executed by Moody's house counsel and other Moody agents in opposition to dismissal of the *Allmon* appeal demonstrate Moody's pervasive control of the *Allmon* appeal and attempts to prevent its dismissal.

(h) Pleadings and affidavits filed in an action brought in federal district court here in Birmingham\* by attorneys who had

previously represented Moody in these proceedings and in the *Allmon* action bear further witness to Moody's pervasive control of the *Allmon* action. The Court refers specifically to affidavits filed in said action by Moody, Manley, and one of Moody's ex-counsel who testified at the hearing on July 19, 1976.

(i) Moody's counsel, Manley, and Martin Solomon, a New York lawyer representing Moody, continued active involvement in the *Allmon* action after it was remanded to the federal district court in Montgomery until well after the hearing in May 1976, on the basis of which the *Allmon* action was dismissed as moot.

(j) Moody's activities and those of his agents described above, are exacerbated by the fact that the federal district court ultimately determined that Willie Allmon had not been injured or damaged in any way by the reinsurance agreement that was submitted by Protective Life Insurance Company ("Protective") and approved by this Court. It was, of course, the reinsurance agreement and the approval of the same by this Court, that Moody utilized as the ostensible factual basis for the *Allmon* litigation.

(k) Moody's activities and those of his agents described above are further exacerbated by the fact that the federal district court ultimately determined that Willie Allmon had intentionally and voluntarily terminated his status as an Empire policyholder during the pendency of the appeal of the *Allmon* action to the Fifth Circuit Court of Appeals. It was Allmon's status as policyholder, of course, that provided the sole basis for maintenance

\**Donald L. Collins, et al., etc. v. Shearn Moody, Jr.*, Civil Action No. 75-L-0484S (United States District Court for the Northern District of Alabama).

of the *Allmon* appeal by Moody's lawyers ostensibly in Allmon's name. The opposition by Moody's lawyers to dismissal of the *Allmon* appeal, moreover, was premised on allegations made by them and other Moody's agents that the termination of Willie Allmon's status as policyholder had been engineered by Protective and was neither voluntary nor intentional. The findings and conclusions of the federal district court on remand conclusively establish those allegations to have been totally without merit.

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

*ONE*: Shearn Moody, Jr. has failed to purge himself of civil contempt of this Court.

*TWO*: Shearn Moody, Jr., has failed to comply with the Order of this Court entered April 30, 1975. Moody specifically failed, *inter alia*, to take the actions required by paragraphs (c), (e), (g), (h) and (j) as set forth on page 7 *et seq.* of said Order.

*THREE*: Shearn Moody, Jr. is hereby ordered to pay to Protective Life Insurance Company and the Receiver any and all costs, damages, expenses incurred by them as a result of Moody's failure to purge himself of civil contempt, including, but not limited to, those incurred by reason of the appeal in the *Allmon* action and the proceedings on remand in that action. As regards Protective, determination of the amount of such damages, etc., shall be made at the hearing presently scheduled for determination of the amount of the default judgment entered against Moody and in favor of Protective in the ancillary proceedings. As regards the Receiver, determination of the amount of such damages, etc., shall be made at the time of the hearing on the



Receiver's petition for damages against Shearn Moody, Jr. in the ancillary proceedings.

*FOUR:* Protective is entitled to recover and Moody is hereby ordered to pay all costs and expenses incurred by reason of the investigation, preparation for, and conduct of the civil contempt proceedings, including, but not limited to, the proceedings herein on July 19, 1976. Protective's counsel is further entitled to recover and Moody is hereby ordered to pay reasonable attorneys' fees attributable to the civil contempt proceedings. The amount of such costs, expenses, and attorneys' fees to be awarded shall be determined by the Court at the hearing presently scheduled for determination of the amount of the default judgment.

*FIVE:* Shearn Moody, Jr. is hereby ordered to comply with any further orders, decrees, and judgments of this Court relating to this matter.

DONE this 1st day of November, 1976.

/s/ WM. C. BARBER  
Circuit Judge

## EXHIBIT 2

IN THE CIRCUIT COURT OF  
JEFFERSON COUNTY, ALABAMA  
IN EQUITY

STATE OF ALABAMA, Ex. Rel.  
JOHN G. BOOKOUT,  
COMMISSIONER OF INSURANCE,  
*Plaintiff,*

*vs.*

EMPIRE LIFE INSURANCE  
COMPANY OF AMERICA, an  
Alabama corporation,  
*Defendant,*

and

SHEARN MOODY, JR.  
*Intervenor.*

CIVIL ACTION  
NO. 171-687

## ORDER

Pursuant to the terms of that certain Order of this Court dated April 30, 1975, adjudging Shearn Moody, Jr. to be in civil contempt, the Court does hereby *ex mero motu* order and command Shearn Moody, Jr. to appear in person before this Court on July 19, 1976, at 1:30 o'clock p.m., in Room 223, Jefferson County Courthouse, 710 North 21st Street in the City of Birmingham, Alabama, and then and there demonstrate to the Court that the said Shearn Moody, Jr. has purged himself of contempt of this Court and has fully complied with the Order of this Court dated April 30, 1975.

All parties to the above cause are hereby granted leave to adduce such evidence as may be deemed necessary in connection with the hearing hereby scheduled in the above cause on July 19, 1976.

If the services of a court reporter are desired, please make your arrangements in advance.

DONE this 16th day of June, 1976.

/s/ WM. C. BARBER  
Circuit Judge in Equity Sitting

### EXHIBIT 3

#### IN THE CIRCUIT COURT FOR THE TENTH JUDICIAL CIRCUIT OF ALABAMA EQUITY DIVISION

STATE OF ALABAMA, Ex. Rel.  
JOHN G. BOOKOUT,  
COMMISSIONER OF INSURANCE,  
*Plaintiff,*

*vs.*

EMPIRE LIFE INSURANCE  
COMPANY OF AMERICA, an  
Alabama corporation,  
*Defendant,*

and

SHEARN MOODY, JR.  
*Intervenor.*

CIVIL ACTION  
NO. 171-687

### ORDER

This Court is in receipt of an order issued by the Supreme Court of Alabama, addressed to the undersigned, as Judge of the Tenth Judicial Circuit of Alabama on April 23, 1975, directing the undersigned to show cause why the undersigned should not specify in some detail what is required of Shearn Moody, Jr. to purge himself of contempt of court. As a result of said show cause order, this Court enters the following findings, conclusions, order and decree:

1. On January 6, 1975, the undersigned, as Judge of the Tenth Judicial Circuit of Alabama, issued an injunction in this

cause, which injunction this Court is expressly authorized to issue by Alabama statute. Title 28A, § 624 *Code of Alabama* 1940, as amended, provides that the Court in a receivership proceeding for an insurance company may, if deemed necessary by the Court, issue injunctions to prevent interference with the receiver, or the receivership proceedings, or the receivership assets. The statute also expressly authorizes the receivership Court to enjoin the commencement or prosecution of legal actions.

2. The injunction issued by this Court on January 6, 1975, enjoined Shearn Moody, Jr. (his officers, agents, servants, employees and attorneys) and others, from filing any lawsuit, complaint or legal claim, or any amendment to a complaint or legal claim, which lawsuit, claim or amendment relates to the receivership of Empire Life Insurance Company of America ("Empire") or the implementation of any order or decree of this Court in connection with said receivership, without the prior approval of this Court.

3. At all times material to this action, Shearn Moody, Jr., an intervenor in this action, has had full and actual knowledge of the entry of the Court's injunction of January 6, 1976, and of the terms of said injunction.

4. On February 3, 1975, this Court ordered Moody (and others) to appear before the Court on February 18, 1975, and to show cause why he should not be adjudged in civil contempt because of failure to obey and comply with the provisions and terms of the Court's injunction of January 6, 1975. Said show cause order was mailed by this Court to Moody personally by certified mail.

5. By order of this Court duly entered herein on February 18, 1975, in compliance with the request of the Supreme Court of Alabama, the hearing on the show cause order addressed to Moody, and the hearing on other, similar, show cause orders which had been directed by this Court to various agents and attorneys of Moody, was continued until March 10, 1975. Notice of said continuance was duly mailed by this Court to all interested persons, including Moody.

6. On March 10, 1975, at the time and place specified, Moody failed to appear. Two attorneys, who then appeared as counsel of record for Moody, Donald L. Collins and A. Eric Johnston, duly appeared in response to the Court's show cause orders which had been directed to them, but made such appearance only in their individual capacities.

7. The records of this Court indicate that the show cause order that was directed to Moody and duly served upon him by registered mail properly addressed and mailed to him by this Court, was returned to this Court "unclaimed."

8. The motion of Intervenor, Protective Life Insurance Company, for judgments of civil contempt against Moody, and several of Moody's attorneys and agents, was heard before this Court, as indicated above, on March 10, 1975. Upon consideration of the motion and supporting papers, voluminous documentary evidence, oral testimony, and argument of counsel, the Court determined that there exists clear and convincing, uncontested, evidence that:

(a) Moody had full and actual knowledge of the Court's order that Moody appear and show cause why he should not be adjudged in civil contempt for violation of the Court's injunc-



tion of January 6, 1975; and that Moody had full and actual knowledge of the pendency of the proceedings on said show cause order on March 10, 1975.

(b) Moody aided, assisted, and participated in the filing of an amended complaint in that certain case then pending in the United States District Court for the Middle District of Alabama, Northern Division, being Case No. 74-377-N, styled as follows: WILLIE ALLMON V. JOHN G. BOOKOUT, ET AL. [hereinafter *Allmon* case]. Said amended complaint was filed on or about November 22, 1974. The Court is advised that the *Allmon* case has been dismissed and is presently pending on appeal to the United States Court of Appeals for the Fifth Circuit.

(c) The amended complaint in *Allmon* calls into question, in aggravated form, all the proceedings had in this Court in connection with the receivership of Empire. The relief sought by the amended complaint includes a demand for judgment by the federal court

"restraining and preventing defendants [including the Commissioner of Insurance of Alabama, the duly appointed Receiver of Empire], their agents, servants and employees, and all other persons who receive actual notice . . . from liquidating Empire and from enforcing the Treaty of Assumption and Bulk Reinsurance . . . from taking any further steps to consummate said Treaty . . . and from enforcing or carrying out any order, judgment, or decree entered in the Circuit [Court] for the 10th Judicial Circuit of Alabama in Case No. 171-687 . . . ."

Amended Complaint at pp. 20-21. The relief sought by the

Amended Complaint also includes a demand that the federal court declare

"that any action taken in the aforesaid case captioned *Alabama ex rel. Bookout v. Empire* is null and void."

Amended Complaint at p. 21.

(d) The approval of this Court was neither sought nor obtained prior to the filing of the aforesaid Amended Complaint.

(e) This Court's Receiver has been subjected to numerous lawsuits in connection with the receivership of Empire; these lawsuits have been filed and prosecuted by Moody, and his attorneys; and these lawsuits have greatly hampered and interfered with the receivership and the implementation of the orders and decrees of this Court relating to the receivership.

(f) Moody has threatened to sue the Receiver, and has threatened to continue to bring such lawsuits against the Receiver for a period of a great number of years. Moreover, Moody has threatened to pursue, by one lawsuit after another, the former Receiver, Judge John G. Bookout, in his individual capacity, until Judge Bookout's death.

(g) The *Allmon* lawsuit was openly and flagrantly solicited by Dale R. Major, an attorney of record for Moody, which attorney misrepresented himself to the named plaintiff in the *Allmon* case as an attorney for Empire Life Insurance Company of America rather than for Moody. At the time the *Allmon* complaint was filed against the Receiver and Protective Life Insurance Company, Allmon had never heard of the Receiver or Protective and knew nothing that either had done to injure him.

(h) After the filing of the *Allmon* lawsuit, which had been solicited by Moody's attorney, another Moody attorney appearing for the plaintiff in the *Allmon* case, Donald L. Collins, on several occasions contacted an ex-employee of the Alabama Insurance Department, Charles E. Hunter, and, in connection with the *Allmon* lawsuit, told Mr. Hunter that Moody was pressuring Collins to take Hunter's deposition in the *Allmon* case.

(i) The lawyers who appear as attorneys of record in the *Allmon* case are attorneys in fact for Moody. The filing of the *Allmon* Amended Complaint was the subject of a conference in Texas attended by Moody and numerous Moody lawyers, which conference was conducted after this Court had entered its preliminary injunction which was incorporated in the permanent injunctive order of January 6, 1975.

(j) No lawyer who purports to be an attorney of record for Allmon discussed the filing of the *Allmon* Amended Complaint with Allmon.

(k) The affidavit of service which accompanies the *Allmon* complaint as amended shows on its face that it was executed in Galveston County, Texas, which this Court knows to be the residence of Moody.

(l) The *Allmon* complaint as amended was filed only by Moody lawyers, all of whom are named in this Court's injunction of January 6, 1975, after the Supreme Court of Alabama had denied a "Petition for a Writ of Mandamus and Writ of Prohibition or Other Remedial Writ" which was brought before the Supreme Court of Alabama on behalf of Shearn Moody, Jr. and others, by Donald L. Collins. The Moody lawyers who filed the Amended Complaint reside in Indiana, Texas and Alabama.

Allmon resides in Star City, Arkansas and had never heard of any of the Moody attorneys until solicited for the filing of the *Allmon* suit.

(m) The filing of the *Allmon* complaint as amended was initiated, sponsored, and aided by Moody, in conjunction with his officers, agents, servants, employees, and attorneys (including Dale R. Major, Donald L. Collins, A. Eric Johnston, and Scott E. Manley, among others).

(n) The filing and prosecution of the *Allmon* case has directly and adversely affected the affairs of Empire, its receivership, its Receiver, and the implementation of the orders and decrees of this Court.

(o) Moody has knowingly and willfully disobeyed and ignored the provisions of the injunction of this Court of January 6, 1975.

(p) By reason of the disobedience and refusal of Moody to comply with the provisions of said injunction, the Receiver, the receivership estate, the Intervenor, Protective Life Insurance Company, and others have suffered substantial damages.

ACCORDINGLY, having made and entered its findings and conclusions, it is

#### ORDERED, ADJUDGED, and DECREED:

1. That Shearn Moody, Jr. is in civil contempt of this Court for having failed and refused to obey its decrees of January 6, 1975.

2. That Shearn Moody, Jr. purge himself of contempt by taking the following actions:

(a) Fully comply with all of the provisions of the Court's decree of January 6, 1975.

(b) Appear in person before this Court on May 7, 1975, at 8:00 o'clock, A.M., in Room 223, Jefferson County Courthouse, 710 North 21st Street, in the City of Birmingham, Alabama, and then and there explain to this Court:

(i) the reasons why the registered letter mailed to Moody on or about February 3, 1975 bearing the return address of this Court was not accepted by Moody when delivered to him;

(ii) the reasons why Moody failed to appear before this Court at the proceedings held herein on March 10, 1975;

(c) Take whatever action may be necessary to withdraw or cause to be withdrawn any and all support (financial or otherwise), aid or assistance which the said Shearn Moody, Jr. has provided or continues to provide to any of his agents, servants, employees or attorneys, which support, aid or assistance relates to the filing or the maintenance of that certain case now pending on appeal from the United States District Court for the Middle District of Alabama, Northern Division, being Case No. 74-377-N, styled as follows: WILLIE ALLMON VS. JOHN G. BOOKOUT, ET AL.

(d) File with this Court, within ten (10) days after the entry of this Order, a sworn statement setting forth in detail an accounting of all fees paid and other compensation or things of value furnished, since November 1, 1974 by or on behalf of Moody to any of the following persons or firms: Donald L. Collins; A. Eric Johnston; the firm of Collins & Johnston; Dale R. Major; Scott E. Manley; the firm of Saxe, Bacon, Bolen & Manley or any of its members or employees.

(e) Require that each of the foregoing persons or firms or

employees immediately furnish to the said Shearn Moody, Jr. sworn statements setting forth in detail:

(i) the amount of any and all fees received by the foregoing persons from Moody or his agents or persons acting in concert with Moody or his agents since November 1, 1974;

(ii) the amount of any and all funds expended by the foregoing persons since November 1, 1974, which funds relate in any way to the *Allmon* lawsuit, the affairs of Empire, its Receiver, or the receivership estate; and

(iii) the exact purpose for which such expenditures were made, identifying with particularity the lawsuit, legal proceeding or other matter to which such expenditures were or are related.

The aforementioned sworn statements shall also itemize with particularity all funds or other compensation advanced by the foregoing persons, firms or employees to any other person or firm in connection with the *Allmon* lawsuit. Upon receipt of said sworn statements by Moody, the same shall be forthwith filed with this Court.

(f) File with this Court within ten (10) days after the entry of this Order a sworn statement setting forth in detail a record of all meetings and conferences attended by Moody since November 1, 1974 at which the *Allmon* lawsuit or the matters and things alleged in the *Allmon* complaint as amended came under discussion. Said sworn statement shall include the dates and places of any such meeting and conference and the names of all persons present.

(g) Discharge any and all agents, servants, employees, and



attorneys presently employed, directly or indirectly, by or on behalf of Moody, whose employment is or has in any way related to the filing or the litigation of the *Allmon* suit, unless it be affirmatively shown under oath that any such person had no knowledge of this Court's injunction of January 6, 1975; and provide this Court with written evidence of each such discharge within ten (10) days of the entry of this order.

(h) Appear in person before this Court on May 12, 1975, at 8:00 o'clock, A.M., in Room 223, Jefferson County Courthouse, 710 North 21st Street in the City of Birmingham, Alabama, and at such further times and places as the Court may direct, and show to the Court that this Order has been fully complied with.

(i) Pay to Protective Life Insurance Company and the Receiver any and all costs and expenses incurred by them as a result of the failure and refusal of Moody to comply with the January 6, 1975 order, including, but not limited to, all costs of the contempt proceedings, including costs of investigation, preparation for and conduct of such proceeding, the costs of defending against the *Allmon* suit, and any and all reasonable attorneys' fees.

(j) Promptly comply with any further orders of this Court relating to this matter.

IT IS FURTHER ORDERED, that Shearn Moody, Jr., be and he hereby is ordered to pay to the Clerk of this Court a fine of Five Thousand Dollars (\$5,000.00) per day, each day, until he shall have purged himself of contempt of this Court; PROVIDED, however, in order that Moody may have an oppor-

tunity to demonstrate that he has brought himself into compliance with this Court's injunction of January 6, 1975, said fine shall not be effective until further order of this Court.

IT IS FURTHER ORDERED, that at 10:00 o'clock, A.M., on May 19, 1975, this Court shall conduct a hearing to determine the extent and amount of damages sustained by any person or party by reason of the failure and refusal of Shearn Moody, Jr. to comply with the Court's injunction of January 6, 1975.

IT IS FURTHER ORDERED, that this Court's order of March 10, 1975 finding Shearn Moody, Jr. in civil contempt of the January 6, 1975 injunction be and it hereby is VACATED.

DONE this 30th day of April, 1975.

/s/ WM. C. BARBER  
CIRCUIT JUDGE